

Agreement for the Installation,
Operation and Maintenance
of Fiber Optic Facilities
on Specified New York Freeways

between

Telergy Network Services, Inc.

and

New York State
Department of Transportation

**AGREEMENT FOR THE INSTALLATION, OPERATION AND
MAINTENANCE OF FIBER OPTIC FACILITIES ON SPECIFIED NEW
YORK STATE FREEWAYS**

BETWEEN

TELERGY NETWORK SERVICES, INC

AND

NEW YORK STATE DEPARTMENT OF TRANSPORTATION

Project ID Number – A989.89.701

Comptroller's Contract No. CP012148

Dated: December 18, 1998

Table of Contents

Section No. & Title	Page No.
I. DEFINITIONS.....	2
1.1 Bankruptcy	2
1.2 Department of Transportation	2
1.3 Facilities	2
1.4 Freeway ROW	2
1.5 ITS	3
1.6 NYT	3
1.7 OFT Capacity	3
1.8 Office for Technology (OFT)	3
1.9 State Fiber	3
1.10 Telecommunications Services	3
II. GRANT OF ACCESS TO FREEWAY	4
2.1 Grant	4
2.2 No Representations	5
2.3 Progress Meetings	5
2.4 Accommodation Plan	6
2.5 Access to State Property for Facilities	6
2.6 Outside Date	6
III. PERMITS AND APPROVALS	7
3.1 Permits	7
3.2 DOT Required Permits	7
3.3 Highway Work Permit	7
3.4 Violation of This Agreement	7
3.5 Fees	8
3.6 Liability Under Permit	8
3.7 Use of Bridges	8
IV. TERM	9
V. CONDITIONS ON USE OF FREEWAY ROW	9
5.1 Use Subordinate	9
5.2 No Adverse Impact Upon Other Authorized Users	9
5.3 Future Grants	10
5.4 No Cost to DOT	10
5.5 Telergy to Repair Any Damages	10
5.6 Abandonment of Facilities	10
5.7 Removal or Relocation of Facilities	10
5.8 Emergency Notifications to Telergy	11
5.9 DOT Restrictions	11

VI. CONSTRUCTION REQUIREMENTS	12
VII. COMPENSATION	17
7.1 Fair Consideration for Freeway ROW	17
7.2 DOT Obligations	19
7.3 Gross Revenue Compensation	19
7.4 Discount on OFT Capacity	19
VIII. INDEMNIFICATION AND INSURANCE	20
8.1 Indemnification	20
8.2 Proof of Insurance	20
8.3 Liability Insurance	21
IX. NOTICES	23
X. MISCELLANEOUS	25
10.1 Lawful Compliance	25
10.2 No Waiver	25
10.3 Force Majeure	25
10.4 Binding Effect	25
10.5 Sublet	25
10.6 Entire Agreement	26
10.7 Modification	26
10.8 Severability	26
10.9 Remedies	26
10.10 Construction	26
10.11 Consents	26
10.12 Acts in Furtherance of Agreement	26
10.13 MacBride Principles	27
10.14 Assignment	27
10.15 NYS Year 2000 Warranty	28
1. Definitions	28
2. Warranty Disclosure	28
3. Warranty Statement	29
10.16 Bankruptcy	29
10.17 Required Clauses	30

APPENDICES

Appendix A	Standard Clauses for all NYS Contracts
Appendix B	RFP (with list of Regional Offices and Accommodation Plan)

EXHIBITS

Exhibits A1/A2	Maps Depicting Freeway ROW
Exhibit B	Contract Between DOT and Crown Communications
Exhibit C	Fiber Network Construction, Operation and Maintenance Manual

**AGREEMENT FOR THE INSTALLATION, OPERATION
AND MAINTENANCE OF FIBER OPTIC FACILITIES
ON SPECIFIED NEW YORK STATE FREEWAYS**

Project ID Number – A989.89.701

Comptroller's Contract No. C012148

This Agreement made as of this 18th day of December, 1998, by and between the People of the State of New York, acting by and through the Commissioner of Transportation, whose principal office is located at 1220 Washington Avenue, Albany, New York 12232 (hereinafter referred to as the "State"), and Telergy Network Services, Inc., a corporation organized and existing under the laws of the State of New York with principal offices located at One Telergy Parkway, East Syracuse, New York 13057 hereinafter referred to as "Telergy".

WITNESSETH:

WHEREAS, Telergy is engaged in the business of constructing, installing, maintaining and operating fiber optic networks to provide all forms of Telecommunications Services; and

WHEREAS, Telergy has been granted a Certificate of Public Convenience and Necessity from the New York State Public Service Commission authorizing it to provide all forms of telecommunications services throughout the State of New York; and

WHEREAS, the New York State Department of Transportation (hereinafter referred to as "DOT") issued a Request for Proposals (hereinafter referred to as "RFP") in conjunction with the New York State Office for Technology offering prospective proposers the opportunity to use certain rights-of-way along freeways to construct and install fiber optic telecommunications facilities as an integral part of the State's initiative to implement a statewide communications network (the "NYT"); and

WHEREAS, on July 10, 1998 Telergy responded to the RFP proposing to use certain portions of the DOT's freeway along I-481 in Syracuse, New York as well as I-87 from Albany to the United States/Canada border in exchange for specific Fair Consideration as defined in Part II of Telergy's Proposal; and

WHEREAS, by letter dated September 4, 1998, the DOT accepted Telergy's proposal subject to negotiation of the Fair Consideration;

WHEREAS, the State and Telergy desire to enter into this Agreement in furtherance of Telergy's use and occupancy of the selected rights-of-way along the freeway in exchange for its payment of the Fair Consideration to allow Telergy to construct, install, operate and maintain a fiber optic network in the Freeway rights-of-ways, subject to the terms and conditions set forth herein.

NOW THEREFORE, for the promises, covenants and other consideration stated in this Agreement, the State and Telergy do hereby agree as follows:

DEFINITIONS

As used herein, the following terms shall have the following meanings:

- 1.1 **"Bankruptcy"** means the happening of any of the following: (i) the filing of a voluntary or involuntary application for, or consent to, the appointment by a federal district court of a trustee over all or substantially all of a party's assets; (ii) the making of a general assignment for the benefit of creditors; (iii) the filing of an answer admitting the material allegations of, or its consenting to, or defaulting in answering, a bankruptcy petition filed against it in any bankruptcy proceeding; or (iv) the entry of an order, judgment, or decree by any court of competent jurisdiction adjudicating Telergy bankrupt or appointing a trustee over its assets, and such order, judgment, or decree continuing unstated and in effect for a period of 60 consecutive days.
- 1.2 **"Department of Transportation ("DOT")"** means the New York State Department of Transportation as defined in Section 2 of the New York State Transportation Law.
- 1.3 **"Facilities"** means Telergy's communications cables, conduits, innerduct, fiber, converters, splice boxes, cabinets, handholes, manholes, vaults, equipment, drains, surface location markers, regenerator and collocation sites, appurtenances and/or other equipment designed and constructed for purposes of constructing, installing, owning, operating and maintaining a fiber optic network to provide all forms of wholesale and retail Telecommunications Services.
- 1.4 **"Freeway ROW"** means the surface, the air space in, on, under, through or above the surface and the area in, on, under, through or below the surface of certain portions of DOT's rights-of-way and property to be used by Telergy under the terms and conditions of this agreement, including without limitation, appurtenant public utility and public service

easements as the same may now or hereafter exist, that are under the jurisdiction of the DOT. Maps depicting the general route of Freeway ROW including mile markers to be used by Telergy to install its Facilities are attached hereto as Exhibits A-1 and A-2.

- 1.5 **"ITS"** means a DOT Intelligent Transportation System Communications System or other internal DOT system used in connection with DOT highway purposes.
- 1.6 **"NYT"** means the statewide communications network as described in pages 1-4 of the Request for Proposals ("RFP"), which RFP is attached hereto as Appendix B.
- 1.7 **"OFT Capacity"** means OC-3 capacity to be provided to OFT in accordance with the provisions set forth in paragraph 7.4 of this Agreement.
- 1.8 **"Office for Technology ("OFT")"** means the New York State Office For Technology or its successor, which among other things administers the NYT and will be obtaining the OFT Capacity and will have use of the State Fiber in accordance with the provisions set forth in this Agreement.
- 1.9 **"State Fiber"** means eight strands of dark fiber from Telergy's facilities between 40 North Pearl Street and mile-post marker 167.5 of I-87, which State Fiber will be used by OFT or its successor solely for the NYT as defined in pages 1-4 of the RFP attached hereto as Appendix B, and not for private commercial uses whether for fee or in-kind services, including fee or in-kind service for the use of the State Fiber, and for economic development activities only as provided in Section 7.1 of this Agreement.
- 1.10 **"Telecommunications Services"** means all forms of wholesale and retail voice, video and data services, currently available or as subsequently available based on regulatory and technological advances, utilizing Telergy's network constructed and installed within the Freeway ROW pursuant to this Agreement. For purposes of this Agreement, Telergy agrees that to the extent it offers wireless Telecommunications Services to customers along the path of the Freeway ROW, it shall do so subject to the terms and conditions of a certain between the State and Crown Communications, which is attached hereto as Exhibit B, and in the event the Crown contract is amended, the DOT shall provide a copy of any such amendments to Telergy.

II. GRANT OF ACCESS TO FREEWAY

- 2.1 **Grant.** The DOT hereby grants exclusive permission, subject to the terms and conditions of this Agreement, to Telergy to use and occupy for the purposes of constructing, installing, operating and maintaining its fiber optic facilities on the I-87 Freeway ROW specified in Exhibit A1 attached hereto and made a part of this Agreement and hereby grants non-exclusive permission, subject to the terms and conditions of this Agreement, to Telergy to use and occupy for the purposes of constructing, installing, operating and maintaining its fiber optic facilities on the I-481 ROW specified in Exhibit A2 attached hereto and made a part of this Agreement. Such use and occupancy shall be for the purposes of constructing, installing, maintaining and operating Facilities in connection with a fiber optic telecommunications system to provide Telecommunications Services within and outside of New York State and for no other purpose. In exchange for the consideration set forth herein DOT hereby agrees that it shall not grant permission or access to use the Freeway ROW specified in Exhibit A1 to other entities to install fiber optic (or its equivalent) facilities or to provide Telecom services subject, however, to the right of way of Crown Communications to provide wireless services in accordance with the terms and conditions specified in Exhibit B. DOT acknowledges that Telergy may be constructing a fiber optic network from Albany to Montreal in connection with Metrix Interlink (a WorldCom affiliate in Canada) and that Telergy may transfer certain of its Facilities installed along the path of the route defined in Exhibit A1 on the United States side of the network to Metrix in exchange for Metrix's transfer to Telergy of certain facilities on the Canadian side of the network, provided however, that in no event shall such transfer interfere with or affect the State Fiber or the ITS Conduit and in all events Metrix shall sign an acknowledgment agreeing to the public version of the terms and conditions of this Agreement prior to any such transfer by Telergy, which public version shall mean this Agreement redacted to exclude any confidential, trade secret or proprietary information. Installation and construction of the fiber optic Facility shall be accomplished strictly in accordance with Exhibits A1 and A2, unless specifically authorized by DOT. All final plans shall be subject to review and approval by the appropriate regional and main office engineering personnel of the DOT. The final plans shall provide for the installation of six or more innerducts and any required regenerator and related facilities.

2.2 **No Representations.** The DOT makes no representation, express or implied, as to the feasibility of the project, the proposed plans and locations, or to the extent of work involved in accommodating any existing utility or facility located within the Freeway ROW. Any coordination with the various utility operators, public or private, is the responsibility of Telergy. Further DOT makes no representations, express or implied concerning the scope or extent of the Freeway ROW where DOT does not hold title in fee, and further makes no representation that subsequent to Telergy's use of Freeway ROW that third parties, will not advance claims challenging DOT's fee title. Telergy shall, at its sole cost and expense, obtain any necessary easements, authorizations or permissions from any landowners along the Freeway ROW where DOT does not have fee title or jurisdiction to authorize Telergy's use and occupancy as of the effective date of this Agreement. In the event a third party challenges DOT's fee title along the Freeway ROW, DOT shall promptly notify Telergy and Telergy shall be entitled to participate, at its sole cost and expense, in any legal or regulatory proceeding relating to Freeway ROW utilized or to be utilized by Telergy and to otherwise negotiate for its continued use of the ROW. Telergy expressly agrees that in the event a third party successfully challenges DOT's fee ownership of any Freeway ROW utilized by Telergy, Telergy shall be responsible to remove or relocate its Facilities at no cost or expense to DOT and Telergy shall not have any recourse against DOT, provided however, that DOT agrees to use its best efforts to provide Telergy with alternate Freeway ROW if available, and further provided that Telergy shall not be liable for any Fair Compensation relating to any portions of Freeway ROW in the event Telergy is required to remove its Facilities therefrom.

2.3 **Progress Meetings.** Telergy and DOT agree to work closely to complete the Project. Telergy shall retain the services of independent contractors for Regions 1, 3 and 7, satisfactory to DOT, who may work in space provided by DOT to interface with DOT and Telergy. In addition, Telergy acknowledges that DOT inspectors may perform inspection activities including oversight of the independent contractors, and Telergy shall be responsible for the costs associated with all reasonable inspection by the DOT. Telergy shall be responsible for the compensation to the independent contractor and if DOT provides space, it shall do so at no cost to Telergy. In addition, the parties agree to schedule regular meetings to discuss overall issues on an as needed basis and further agree that upon

the request of one party, the other party shall meet within five business days of a request for a meeting.

2.4 **Accommodation Plan.** The use and occupancy of DOT Freeway ROW authorized by this Agreement is subject to the State's "Accommodation Plan" made a part hereof and attached hereto as Attachment 3 of the RFP, which RFP is attached hereto as Appendix B. The said Accommodation Plan is approved by the Federal Highway Administration pursuant to 23 CFR S645.215 and is binding upon the DOT as provided by federal law and regulations. The DOT reserves the right to modify or amend the Accommodation Plan subject to Federal law or regulation at any time and, upon DOT's provision of a copy of any amendments to the Accommodation Plan to Telergy pursuant to the Notice provisions set forth in Section IX of this Agreement, such amendments or modifications would be applicable to this Agreement.

2.5 **Access to State Property For Facilities.** In the event Telergy requires access to lands owned by the State of New York for purposes of installing regeneration equipment or similar equipment or electronics necessary to provide the State Fiber or ITS Conduit and in connection with the Facilities authorized to be installed pursuant to this Agreement, the DOT shall make property under its jurisdiction available without lease or similar fees from Telergy and shall make reasonable efforts to assist Telergy in obtaining access to other property owned by the State without lease or similar fee payments from Telergy. Telergy's use of such property shall constitute use by the State of New York for purposes of municipal approvals, including ordinances, rules, regulations and zoning requirements.

2.6 **Outside Date.** Telergy agrees that it shall substantially complete construction of its Facilities in the Freeway ROW along I-87 which is depicted in Exhibit A1, within three years from the date this Agreement is approved by the New York State Comptroller. In the event Telergy fails to complete such construction, DOT may authorize use of the I-87 Freeway ROW by another telecommunications provider.

III. PERMITS AND APPROVALS

- 3.1 **Permits.** Prior to commencing construction in Freeway ROW, Telergy agrees to obtain all necessary state, Federal, and local governmental permits and approvals necessary to construct, install, own and operate, lease, maintain, locate, upgrade, repair, move, protect, reconstruct, relocate, remove and replace its Facilities consistent with the terms of this Agreement. Telergy shall be responsible for identifying and obtaining any particular permits or approvals required in any buffer zone at or near the US/Canadian border. Telergy shall furnish to the DOT copies of any such permits and approvals issued by governmental entities other than the DOT.
- 3.2 **DOT Required Permits.** DOT agrees to cooperate and issue, on an expedited basis, all permits required by DOT that are necessary for Telergy to install its Facilities hereunder. Telergy acknowledges that it will be required to obtain a Highway Work Permit prior to actual installation and, in addition, an Annual Maintenance Permit prior to the undertaking any maintenance activity of the Freeway ROW. DOT agrees to use due diligence with respect to its issuance of the Highway Work Permit to enable Telergy to commence construction and installation activities in accordance with the terms and conditions specified therein. A DOT approved traffic control plan for installation, operation and for future access is a prerequisite to issuance of the Highway Work Permit. Telergy agrees to comply with the Application and general conditions for such "Highway Work Permit", including such other terms and conditions which may be required by the DOT, and the Annual Maintenance Permit as set forth in Title 17 Part 131 NYCRR, provided however, that any fees or compensation required for the Highway Work Permit and the Annual Maintenance Permit has been addressed in the compensation set forth in Section VII of this Agreement.
- 3.3 **Highway Work Permit.** In the event of any inconsistency between any terms and conditions set forth in any highway work permits issued by DOT to Telergy and any Exhibits to this agreement, the terms and conditions of the highway work permit shall be controlling.
- 3.4 **Violation of this Agreement.** The violation of any highway work permit, or the Annual Maintenance Permit, or of any other law, rule or regulation at any time by Telergy or its

agent(s) in the installation, operation or maintenance of Facilities within Freeway ROW shall be the basis for denial of use, imposition of fines, or physical removal of Telergy Facilities as designated in such permit, or as provided by law, upon written notice to Telergy by the DOT with a thirty-day period to cure.

- 3.5 **Fees.** Except as expressly provided in this Agreement, upon issuance of a permit and from time to time during any installation, operation, or maintenance periods, Telergy shall pay to the DOT those amounts representing all of the costs of processing the application and administering the permit, including without limitation any costs relating to the need to relocate the facility in connection with any other work performed by the DOT.
- 3.6 **Liability Under Permit.** Acceptance of a permit by Telergy shall constitute an agreement by Telergy, notwithstanding any other provision of law, to assume all liability for any loss, cost, damage, or harm arising out of or relating to the installation, operation or maintenance, of its facility and to the presence of its Facilities in the Freeway ROW except as provided in paragraphs 5.11 and 8.1 of this Agreement. Further, acceptance of this Agreement shall constitute an agreement by Telergy to indemnify and save harmless the State, its officers, agents, and employees, any municipality in which the work is being performed, and/or any public benefit corporation, repaired, or public utility whose property or facilities are affected from suits, claims, actions, damages and costs, of every name and nature, relating or arising from the construction, installation, maintenance and operation of fiber optic network in Freeway ROW pursuant to this agreement except as provided in paragraphs 5.11 and 8.1 of this Agreement. Telergy has the obligation, at its own expense, for the defense of any action or proceeding which may be brought against the parties specified in this Section. This obligation shall include the cost of attorney fees, disbursements, costs and other expenses incurred in connection with such action or proceeding.
- 3.7 **Use of Bridges.** Telergy agrees to comply with and understands that DOT will evaluate and approve Telergy's use of bridges in accordance with Section 131.20 of 17 NYCRR. Telergy further agrees to install Facilities on bridges or other structures as stated in the initial application for the permit applicable to the particular bridge. The parties acknowledge that Telergy shall be attaching to the Hudson and Mohawk River bridges. In the event Telergy requires attachments to other bridges, Telergy shall notify DOT and shall

comply with the requirements specified in this paragraph 3.6.

IV. TERM

- 4.1 This Agreement shall be effective on December 18th, provided however that this Agreement is subject to review by the Attorney General of the State of New York and approval from the Comptroller pursuant to Section 112 of the State Finance Law. This Agreement shall continue in full force and effect for a period of forty-five (45) years terminating on December 17, 2043. The parties agree that Telergy shall have the option of terminating this Agreement upon the expiration of twenty years upon written notice to the State and DOT, provided however, that the Agreement shall continue in full force and effect for a period of one-year following such written notice by Telergy. Any amendments or modifications to this Agreement shall be by mutual agreement of the parties and evidenced in written signed by both parties.

V. CONDITIONS ON USE OF FREEWAY ROW

- 5.1 **Use Subordinate.** Telergy's exclusive use of the Freeway ROW depicted on Exhibit A1 and its non-exclusive use of the Freeway ROW depicted on Exhibit A2 is subordinate to the prior use by: (i) the DOT; and (ii) other persons authorized by the DOT pursuant to approvals or permissions issued prior to this Agreement to use the specified Freeway ROW, provided however that the DOT shall provide Telergy with a copy of any agreements governing such third-parties' use of the Freeway ROW. Telergy's use is also subordinate to all easements, restrictions, conditions, covenants, encumbrances and claims of title currently in existence whether known or unknown which may affect the specified Freeway ROW. Telergy shall, at its own expense, obtain such permissions as may be required because of existing rights granted to or held by other parties. The DOT agrees that future permissions or agreements to allow third parties to use the I-481 Freeway ROW shall contain the same aforementioned language.
- 5.2 **No Adverse Impact Upon Other Authorized Users.** Except as permitted by applicable law or this Agreement, Telergy shall not damage or impair the use of any Freeway ROW including without limitation, streets, sidewalks, sanitary sewers, storm drains, water mains, gas mains, poles, overhead or underground wires or conduits without the prior written

approval of the DOT and any other owner(s) of the affected property. Telergy shall adequately and properly protect any existing underground utilities located within or near said installation.

5.3 **Future Grants.** Subject to the review and approval of the DOT, permission may be granted by the DOT for other utilities to cross the area of the Freeway ROW or to cross Freeway ROW by installing facilities on bridges or other structures to be occupied by the proposed Facilities, provided that said activities do not interfere with Telergy's Facilities installed pursuant to this Agreement.

5.4 **No Cost to DOT.** The construction, installation, operation, maintenance and removal of Facilities shall be accomplished without cost or expense to the DOT and shall be subject to the approval of the DOT and in accordance with all applicable laws, rules and regulations and such construction and other standards as the DOT may from time-to-time apply generally to users of the Freeway ROW and shall be accomplished in such manner as not to endanger persons or property or unreasonably obstruct access to, travel upon or other use of the specified Freeway ROW.

5.5 **Telergy To Repair Any Damages.** Telergy shall be responsible for any and all damage direct or indirect, of whatever nature to Freeway ROW, existing utilities, curbs and sidewalks due to its installation, maintenance, repair or removal of its Facilities in Freeway ROW, and shall repair, replace and restore in kind any such damage at its sole expense to the same condition as existed before such work commenced.

5.6 **Abandonment of Facilities.** If any portion of Telergy's Facilities covered by this Agreement are formally abandoned by Telergy and upon the expiration of the Term, it shall notify the DOT in writing at least thirty (30) days in advance and Telergy shall either promptly vacate and remove the Facilities at its own expense or, upon written approval of the DOT, may abandon some or all of the Facilities in place. Upon expiration of the Term, unless DOT directs Telergy in writing to abandon underground Facilities in place, Telergy shall be required to remove its Facilities in accordance with paragraph 5.7 below.

5.7 **Removal or Relocation of Facilities.** Except where payment is required by the New York State Highway Law, any relocation of any fiber optic facility allowed to be on the Freeway

ROW, made necessary as a result of a determination by DOT that relocation is required for highway construction or maintenance operations, or changes in Department policy or design standards, shall be made promptly and at the expenses of Telergy. Telergy shall remove or relocate, without cost or expense to the DOT, the Facilities it installs under this Agreement if and when made necessary by highway improvements in the Freeway ROW, provided however that DOT shall use reasonable efforts to avoid or minimize the need for Telergy to remove or relocate the Facilities once installed, and further provided that DOT shall give Telergy written notice of any planned and scheduled necessary improvements that may impact Telergy's Facilities at least six months prior to undertaking any improvement requiring Telergy to relocate and further provided that DOT shall use reasonable efforts to obtain access to other State of New York or DOT Rights-of-Way for Telergy's relocation near the path of the existing Facilities at no additional cost to Telergy. However Telergy understands and agrees that in the event of unforeseen, unscheduled and emergency work by DOT, DOT will not be able to give Telergy such advance written notice but DOT shall provide Telergy advance notice as soon as possible under the circumstances. Said removal or relocation shall be completed within six months following written notification by the DOT, or such other reasonable period as the DOT may reasonably direct in the event of an emergency taking into account any hardship to Telergy. Should Telergy decide to remove or relocate its Facilities in the Freeway ROW, it shall give the DOT not less than ten (10) days prior written notice of its intent to do so. Before proceeding with removal or relocation work Telergy shall obtain such additional permits as may be required by the DOT. The DOT will cooperate and issue, on an expedited basis, all permits necessary to enable Telergy to relocate its Facilities at minimal disruption to its services.

5.8 **Emergency Notifications to Telergy.** The Telergy Operations Control Center shall be available to DOT staff, 24 hours a day, 7 days a week, regarding problems or complaints resulting from the Facilities installed pursuant to this Agreement and may be contacted by telephone at the number which shall be provided to the DOT and OFT within ten (10) days after execution of this Agreement.

5.9 **DOT Restrictions.** The DOT reserves the right to restrict the use of Freeway ROW, including but not be limited to: number and types of facilities allowed: physical space

occupied by the Facilities or by equipment used for installation, operation or maintenance; provisions of a traffic control plan for the maintenance and protection of traffic; system expansion and other similar provisions. However, DOT hereby authorizes Telergy to construct and install at least six 1 1/4 inch HDPE innerducts and related equipment, electronics and regenerator or collocation sites in the Freeway ROW, and to connect service laterals to its network off Freeway ROW either at exit points off the Freeway or where at the intersection of utility transmission rights-of-way.

- 5.10 Telergy agrees to provide the Department with a log of each entrance onto the Freeway ROW with personnel and/or equipment to include date, time, duration, location of entrance onto and exit from the rights-of-way, and the reasons for such entrance and exit, the equipment and personnel involved.
- 5.11 The DOT shall have no liability or responsibility whatsoever for the loss, damage or destruction of the fiber optic facility, or for any other improvements made by Telergy, or for property stored on the premises, or for the damages to Telergy resulting from or suffered as a consequence of damage or destruction to the fiber optic facility, however, the DOT shall be required to use reasonable care in the construction, reconstruction, maintenance or repair of its highways, in conducting inspection and similar activities under this Agreement, and in using the State Fiber and the ITS Conduit, and the DOT shall be liable for the damage or destruction of the cable resulting directly from the failure to use reasonable care in such instances. Other than as set forth herein, the DOT shall have no obligation to protect care for or maintain Telergy's fiber optic facility.
- 5.12 It is understood and agreed that Telergy is acting as an independent contractor and not as an agent of the DOT or the State of New York.

VI. CONSTRUCTION REQUIREMENTS

- 6.1 Telergy shall provide all intrusive maintenance of its network and Facilities consistent with the Maintenance Procedures included in the Fiber Network Construction, Operation and Maintenance Manual attached hereto as Exhibit C (herein after referred to as "Manual"). Telergy agrees to install along with any buried facilities a system of continuous plastic ribbon or marking tape. Such marker shall be installed at a level no less than 12 inches

below the surface of the ground. The marker shall include a metallic or other system capable of reliably emitting a signal readable by locating equipment operated on the surface. Telergy also shall install adequate permanent buried cable markers showing the approximate horizontal and vertical location of its underground facility. Such post markers shall not interfere with highway operations or maintenance and shall be offset from the actual location of the facility necessary to avoid such interference. Telergy shall also maintain records that describe the facility, its location, depth, size, and other relevant data, which shall be available upon request to the DOT and to other interested agencies. Telergy agrees to employ directional boring techniques unless otherwise authorized in writing by the DOT. Telergy further agrees that it will not install its Facilities within the median unless otherwise authorized in writing by the DOT. Within 120 days following the completion of the work authorized under a permit, Telergy shall file with the main office of the DOT and the affected Regional Office as set forth in pages 1 and 2 of Attachment 3 of the RFP attached hereto as Appendix B one complete set of "as built" plans showing the locations of all parts of the facility. Telergy shall also file with the DOT at that time one complete set of said plans on microfiche or other form of information storage system as reasonably determined by DOT.

- 6.2 Except where this Agreement calls for different procedures, Telergy shall comply with the construction standards, location standards, and special marking techniques established by the most recent publication of 23 CFR 645 and any Highway Work Permits, and where not inconsistent, with the Manual attached to this Agreement as Exhibit C
- 6.3 The DOT shall have authority to place inspectors on site to monitor and observe Telergy's activities, and/or to request the presence of state or local police to assure the safety of freeway travelers, at such times and for such periods as the DOT deems appropriate. All costs thereof shall be borne by Telergy.
- 6.4 Telergy shall construct and keep its Facilities in good and safe condition and free from any nuisance, consistent with industry standards. Without limiting the generality of the foregoing, Telergy shall comply with the construction, maintenance, traffic plan and other standards issued by the DOT; the terms of this Agreement; and, any other lawful rules and DOT ordinances and regulations generally applicable to work in the Freeway ROW.

- 6.5 Telergy's Facilities shall be constructed, installed, modified and maintained within the Freeway ROW in accordance with Underground Standards for Construction, the Manual Uniform Traffic Control Devices, the National Electric Code (NEC), the National Electrical Safety Code (NESC), and Rules and Regulations of the Occupational Safety and Health Act (OSHA), and in compliance with all Federal, State and local laws, rules, regulations, codes and/or ordinances governing the activities contemplated by this Agreement, including without limitation, any required environmental approval. Telergy shall install its Facilities to the US/Canada border in the following three Phases, which Phases may be constructed and inspected in smaller segments: (i) Town of Colonie, Albany to Exit 19 Glens Falls; (ii) Exit 19 Glens Falls to Exit 31; and (iii) Exit 31 to US/Canada border. Unless otherwise authorized by the DOT, Telergy agrees that it shall not commence physical construction of a Phase until it substantially completes the restoration of the prior Phase, provided however, that preliminary engineering, permitting and set-up shall not be considered physical construction for purposes of this limitation of physical construction.
- 6.6 Telergy's confidential Critical Path Schedule setting forth the approximate performance dates will be provided to the DOT within the (10) days following approval by the Comptroller. The DOT shall review and approve the location of the Facilities as reflected on Working Drawings, one copy of which shall be provided to the DOT prior to the commencement of construction to ensure the location of the Facilities does not conflict with other projects of the DOT. If a conflict does exist, the Telergy Facilities shall be relocated to a mutually acceptable route. At no cost to the DOT, Telergy shall provide one copy of As Built drawings when the Facilities along each of I-481 and I-87 are completed to the main office of the DOT and the affected Regional Office as set forth in pages 1 and 2 of Attachment 3 of the RFP attached hereto as Appendix B. Telergy shall certify to the accuracy of the Working Drawings and the As Built drawings and attest to the fact that the improvements were constructed in conformity with the plans and specifications approved by the DOT.
- 6.7 Plans and specifications required to construct all facilities subject to this Agreement shall be prepared by a Professional Engineer registered by New York State. The drawings and specifications shall be sealed and signed by the Professional Engineer. The Engineer shall

certify that the plans and specifications have been prepared in conformance with the applicable codes, standards, and conditions of authorities governing the work.

- 6.8 All work shall be done in a skillful manner with reasonable dispatch and in accordance with the plans and specifications reviewed and approved by DOT.
- 6.9 DOT shall be advised in advance of the time when the work in Freeway ROW will commence and DOT shall be entitled to send an Inspector to observe the construction and installation of the Facilities in the Freeway ROW. The work of installation, including shoring, protection of pipes and facilities and other safety measures, shall be subject to the oversight of the DOT.
- 6.10 The entire excavation of said work is to be protected by suitable guards. Signals both by day and night are to be utilized, and precautions are to be taken by all reasonable means to prevent any accident or injury while the work is in progress. Traffic maintenance, control and protection shall be the responsibility of Telergy.
- 6.11 Telergy, its successors and assigns, agree that the DOT, shall have the authority to demand any reasonable on-site investigations, excavation or actions, to be taken at the sole expense of Telergy, which actions are necessary to ensure that the excavation of Freeway ROW does not damage or impair DOT utilities or threaten the public health and welfare.
- 6.12 The DOT reserves the right to observe the ongoing construction to conduct site inspections of materials and workmanship, or for any other lawful governmental purpose.. In the event Telergy or its contractors are at a site at the time of a DOT inspection, the DOT inspector shall notify the site supervisor of DOT's presence, and otherwise shall notify Telergy's Director of Rights-of-Way in writing if a problem is discovered and no Telergy representative was present at the site. DOT shall promptly and immediately advise Telergy in writing in the event any deficiencies are noted and Telergy shall promptly initiate corrective action at its sole cost and expense. All DOT observation and inspection of the Telergy Facilities shall not include physical disturbance of Telergy Facilities.
- 6.13 Telergy shall maintain accurate maps, and other appropriate records of its Facilities as they are actually constructed in the Freeway ROW.

- 6.14 Upon completion of the construction and installation activities for components of the Phases, Telergy, at its sole cost and expense, shall restore the grounds to at least as good a condition as existed before said work commenced and agrees to notify the DOT in writing that its restoration efforts are completed. Provided that the Telergy notice to DOT includes DOT's inspection, if it desires to conduct the same, of no more than twenty-five (25) miles of a given Phase, the DOT, shall inspect such restored grounds within a reasonable time not to exceed thirty (30) days from receipt of the notice. If the DOT reasonably determines that additional restoration is required for a component of a Phase, the DOT shall notify Telergy in writing within such thirty (30) day period of the specific additional remedial steps to be taken. Telergy shall undertake such necessary and reasonable remedial activities, to the extent possible, within a reasonable period of time, not to exceed thirty (30) days following receipt of the DOT notice. The parties agree however that DOT shall conduct its inspection of the final component of the final Phase within ten (10) days following Telergy's notice. The parties further agree that the DOT preserves the right to inspect the Freeway ROW after the initial inspection during the Term of the Agreement and to require Telergy to take reasonable remedial action consistent with industry standards upon reasonable notice and a reasonable period for Telergy to perform under the circumstances.
- 6.15 Telergy agrees that upon completion of the Facilities and acceptance and approval of the restoration by the DOT, the use, operation and maintenance of its Facilities located therein will be subject to all applicable laws, rules, ordinances and procedures.
- 6.16 In order to minimize construction projects for fiber optic networks along the Freeway ROW, the number of projects that may be required to accommodate the Facilities of Telergy, Telergy shall construct conduit of sufficient capacity to meet its current and foreseeable future needs and that satisfies the requirements set forth in DOT's Accommodation Plan, which is incorporated herein by reference and is attached hereto as Attachment 2 to the RFP, which RFP is attached as Appendix B. In the Freeway ROW covered by this Agreement, Telergy shall cooperate with all other public utilities regarding their lease of any extra capacity subject to an agreement acceptable to Telergy and such other public utility, provided however that Telergy agrees that it will lease a minimum of twenty-five percent (25%) or its equivalent to third party telecommunications carriers upon

commercially reasonable terms if such carriers desire capacity along the route of the Freeway ROW.

- 6.17 Telergy makes no warranties, representations or agreements, expressed or implied either in fact or by operation of law, statutory or otherwise, including warranties of merchantability or fitness for a particular purpose, with respect to the extra capacity described above and in no event shall Telergy be liable to the DOT or any party for any direct, incidental, consequential, punitive or special damages with respect thereto.

VII. COMPENSATION

7.1 Fair Consideration for Freeway ROW

Telergy agrees to provide the OFT an irrevocable right to use (IRUs) eight (8) strands of single mode dark fiber (non-zero dispersion shifted) between Telergy's end-points that are constructed in Freeway ROW along Exit 1 through Mile Marker 167.5 of I-87 and continuing to New York State's point-of-presence at 40 North Pearl Street, Albany, New York ("State Fiber"). The State Fiber shall be used by OFT or its successor solely for the NYT and solely for the purposes as provided in paragraph 1.9. Additionally, the State shall have the limited right to use the State Fibers to provide capacity to commercial or for-profit entities solely in connection with economic development activities in the State of New York provided that the State may not allow any third party, or its agents, affiliates, subsidiaries or successors (collectively "Entity") to use any portion of the State Fiber or capacity available therefrom for more than two years per economic development Entity, and the State shall require any such Entity to hold Telergy harmless from any losses, causes, damages or liabilities for such third party's negligence or tort arising from or relating to the Entity's use of any portion of the State Fibers or capacity obtained therefrom.

The State and OFT agree not to sell, lease or transfer the State Fiber to any third party without the prior written consent of Telergy, provided however the use of capacity of the State Fiber consistent with the terms set forth in Section 1.9 shall not constitute a sale, lease or transfer of State Fiber for purposes of this paragraph. The State and OFT understand that Telergy shall be solely responsible for all maintenance activities for its Facilities and the State Fiber and that no other entity or person shall be authorized to perform any

maintenance activities on the State Fiber.

The DOT shall use the ITS Conduit only for highway purposes and the OFT shall use the State Fiber only as part of the NYT except for the State's use for economic development activities provided for in this paragraph. Telergy also agrees to connect the State Fiber from Telergy's POP at 11 North Pearl, Albany, New York to DOT's POP at 40 North Pearl Street, Albany, New York. In addition, Telergy agrees to make one empty conduit available from Exit 1 through Exit 43 of I-87 for potential ITS communications needs ("ITS Conduit"). The ITS Conduit will be marked as reserved for ITS use, however, DOT or its agent must pay all costs if it desires to extend the ITS Conduit to the Traffic Management Center. Telergy agrees to allow DOT supervised access to Telergy handholes located along the path of the ITS Conduit at no additional charge to DOT in order for DOT to use the ITS Conduit. Telergy shall be responsible for all costs associated with the design, operation and maintenance of the State Fibers. Telergy also shall provide the State with one standard relay rack space for the State to install its regenerator equipment for the State's use for the NYT. The regenerator locations on this route shall be selected by Telergy in consultation with DOT concerning site availability along the I-87 Freeway ROW and consistent with industry requirements. In addition, Telergy will provide 20 amps of DC power for the State equipment and allow access to the buildings for State personnel in accordance with Telergy's Standard Collocation terms included in the Manual attached hereto as Exhibit C and incorporated herein by reference, provided however that the Collocation Fees for DOT equipment for its own non-commercial purposes is waived. Telergy shall maintain the State Fiber and the ITS Conduit free of charge for the Term of this Agreement, provided however that DOT shall be responsible for maintaining any cable DOT installs within the ITS Conduit at DOT's own cost and expense and the State shall be responsible for any equipment or electronics in connection with the State Fiber, DOT or the State shall notify Telergy in writing prior to any physical entry in the ITS Conduit, innerduct system or Facilities and shall not enter the ITS Conduit, innerduct system or Facilities without a Telergy escort provided however that in the event of an emergency requiring DOT's or the State's immediate access, the State or DOT shall call the 24-hour number provided in the Manual and Telergy shall ensure an escort is available consistent with responding to the emergency.

7.2 **DOT Obligations.** In connection with Telergy's obligation to deliver any State Fiber or the ITS Conduit, the State agrees to provide Telergy with access to all building entrances for the Network Access Points at no cost, expense or charge to Telergy.

7.3 **Gross Revenue Compensation.** In addition to the State Fiber and the DOT's ITS Conduit, Telergy agrees to pay fees to the State according to the following formula: (1) 0% of Telergy Network Service's Gross Revenues from leases or other transfers of dark fiber or conduit between \$1.00 and \$100 million dollars; (2) 3% of Telergy Network Service's Gross Revenues from leases or other transfers of dark fiber or conduit between \$100 million and \$250 million; (3) 5% of Telergy Network Service's Gross Revenues from leases or other transfers of dark fiber or conduit between \$250 million and \$500 million; and (4) 10% of Telergy Network Service's Gross revenues from leases or other transfers of dark fiber or conduit in excess of \$500 million.

Telergy agrees that it shall lease fiber and conduit only at fair market value in arms-length transactions and shall lease fiber or conduit to any affiliate or subsidiary only upon commercially reasonable rates, terms and conditions that are no more favorable than the rates, terms and conditions Telergy would afford to a non-affiliated third-party under the circumstances at the time.

Telergy agrees to maintain true and correct sets of records in connection with its accounting, billing and collection of Gross Revenues from leases or other transfers of dark fiber or conduit and its payments of a portion thereof to the State as required under this paragraph 7.3 and such records shall be made available annually for reasonable audit and inspection by the State at no cost or expense to Telergy.

7.4 **Discount on OFT Capacity.** Telergy agrees to obtain and provide the New York State Office for Technology, or its successor for a minimum period of ten (10) years with one (1) OC-3 of capacity from Buffalo through Albany and Pleasant Valley to New York City and from Buffalo through Syracuse and Auburn to Binghamton at an annual cost of \$238,980.00 which sums shall be paid by OFT to Telergy on a monthly basis within thirty (30) days of the date of Telergy's invoice. The rate represents a discount off the current market price for such capacity. In the event that OFT obtains alternate redundant

capacity from Albany to New York City, OFT shall be entitled to terminate its use of Telergy's capacity along that route without penalty upon thirty (30) days written notice. Telergy will provide one (1) OC-3 from Buffalo to Albany within thirty days from the date this Agreement is approved by the Comptroller, and that Telergy will provide or obtain one OC-3 from Albany to New York City and from Buffalo through Syracuse and Auburn to Binghamton within thirty days from completion of the construction and installation of the Telergy network in each of those locations. Telergy anticipates that its subsidiary will complete construction to New York City and to Binghamton during 1999 conditions permitting.

VIII. INDEMNIFICATION AND INSURANCE

8.1 **Indemnification.** Telergy agrees that it shall indemnify and hold harmless the State, DOT and OFT, its officers, employees and agents from and against all losses and claims, demands, payments, suits, actions, recoveries and judgments of every nature and description resulting from bodily injury, property damage or personal injury, brought or recovered, by the negligence or willful misconduct of Telergy, its agents or employees, in the construction, installation, maintenance or operation of its Network within the Freeway ROW, except to the extent caused by the negligence of the State, DOT or OFT. Conduct by employees, consultants, officials, or agents employed or otherwise retained by the State, the DOT, or OFT, shall not be construed to be conduct of Telergy or its agents.

8.2 **Proof of Insurance.** Prior to commencing work in the Freeway ROW, Telergy shall provide the DOT a certificate of insurance showing proof of the required coverage as set forth below. Any deductibles of self-insurance retention must be disclosed on the certificates of insurance. Such insurance shall bear the names of Telergy as named insured and the State of New York, DOT and OFT as additional insureds. When umbrella or excess coverage is in effect, it must follow the form of the underlying coverage. All such insurance policies and certificates of insurance shall stipulate that should any of the above policies or certificates of insurance be canceled or modified before the expiration of the Term hereof, the issuing company shall give thirty (30) days written notice to the DOT. Certificates of Insurance (and all subsequent insurance notices) shall be sent to the DOT, Attn: Director, Contract Management Bureau, Building 5, Room 108, 1220 Washington

Avenue, Albany, New York 12232 no later than sixty (60) days after the effective date of this Agreement. In no event shall work, installation, construction, maintenance or operation of the Facilities pursuant to this Agreement begin until such insurance is in place and the Certificate has been provided to the DOT.

8.3 **Liability Insurance.** Telergy, its successors or assigns, shall obtain, and maintain at all times during the term of this Agreement, insurance for liability for damages imposed by law, of the kinds and in amounts hereinafter provided in insurance companies authorized to do business in the State covering all operations under this Agreement whether performed by Telergy, its contractor(s) or subcontractor(s). Telergy shall furnish to the State a certificate or certificates, in a form satisfactory to the State, showing compliance with this Section, which certificate or certificates, shall provide that the policies shall not be changed or canceled until thirty (30) days written notice has been given to the State. The kinds and amounts of insurance required are as follows:

- (a) A policy covering the obligations of Telergy or their contractor(s) in accordance with the provisions of the Workers' Compensation Law, covering all operations under the contract, whether performed by Telergy, its contractor(s) or subcontractor(s) and also under the Disability Benefits Law. This Agreement shall be void and of no effect unless Telergy procure or require procurement of compensation and disability benefits coverage for the benefit of, and keep insured during the life of said contract, such employees in compliance with the provisions of the Workers' Compensation Law (State Finance Law §142).
- (b) Liability and Property Damage Insurance. Policies following the 1986 ISO formats shall be provided. Unless otherwise specifically required by special provision, each policy shall not be amended or contain deductible clauses or coverage exclusions of any nature and shall have limits not less than:

1986 Insurance Services Office format:

Bodily Injury and Property Damage Liability Combined Single Limit	
each Occurrence	Aggregate
\$1,000,000	\$4,000,000

For all damages arising during the policy period, shall be furnished in the types (a) through (f.) as described below. An umbrella type policy, dedicated to this agreement, may be used to meet these limits. Telergy shall require that the State, DOT and OFT be named as additional insureds on each policy:

- a. Contractor's Liability Insurance issued to and covering the liability for damages imposed by law upon each Subcontractor with respect to all work performed by said subcontractor under the Agreement;
- b. Contractor's Protective Liability Insurance issued to and covering the liability for damages imposed by law upon the Contractor with respect to all work under the Agreement performed for the Contractor by subcontractors;
- c. Completed Operations' Liability Insurance issued to and covering the liability for damages imposed by law upon the Contractor and each subcontractor arising between the date of final cessation of the work and the date of final acceptance thereof, out of that part of the work performed by each;
- d. Protective Liability Insurance issued to and covering the liability for damages imposed by law upon The People of the State of New York, the State of New York, and the Commissioner of Transportation and all employees of the Commissioner of Transportation both officially and personally, any municipality in which the work is being performed, and/or any public benefit corporation, railroad, or public utility whose property or facilities are affected by the work or any consultant inspecting engineer or inspector working for or on the Project, and their agents or employees, with respect to all operations under the Agreement by the contractor or its subcontractors, including omissions and supervisory acts of the State, municipality, public benefit corporation or consultant. Failure to list a firm, organization or municipality, etc. does not eliminate the requirement to provide such coverage.

If the Contractor elects to use the same policy for more than one project, it must provide with the insurance certificate the Aggregate Limits of Insurance (per project), Endorsement indicating the specified project site, and contract number;

- e. Commercial General Liability (Premises, Existence, Hazard) Insurance (formerly called Owner's, Landlord's and Tenant's Liability Insurance) issued to and covering the liability for damages imposed by law upon The People of the State of New York, OFT, the State of New York and the Commissioner of Transportation and all employees of the Commissioner of Transportation both officially and personally, any municipality in which the work is being performed, and/or any public benefit corporation, railroad, or public utility whose property or facilities are affected by the work or any consultant inspecting engineer or inspector working for or on the Project, and their agents or employees, with respect to temporarily opening any portion of the State construction Project under this Agreement, until the construction or reconstruction pursuant to the Agreement has been accepted by the State.

Failure to list a firm, organization or municipality, etc. does not eliminate the requirement to provide such coverage. This coverage will not be required for contracts involving only turf establishment, landscaping, or traffic signals, which do not involve work on the roadway.

- f. Automobile Liability and Property Damage Insurance. A policy covering the use in connection with the work covered by the Contract Documents of all owned, non-owned and hired vehicles bearing, or, under the circumstances under which they are being used, required by the Motor Vehicle Laws of the State of New York to bear license plates.

IX. NOTICES

- 9.1 All notices permitted or required hereunder shall be in writing and shall be transmitted via certified United States mail, return receipt requested, or by private same day or overnight delivery service and shall be addressed as follows or to such different addresses as the parties may from time-to-time designate:

If to the DOT to the appropriate Regional Director listed in Attachment 3 of the Request for Proposal attached hereto as Appendix B and to:

New York State Dept. of Transportation
1220 Washington Avenue

Albany, New York 12232
Attn: Director, Real Estate Division
Telephone: (518) 457-2430
Facsimile: (518) 457-8069

with a copy to:

New York State Dept. of Transportation
Legal Department
1220 Washington Avenue
Albany, New York 12232
Attn: Chief Counsel
Telephone: 457-2411
Facsimile: 456-4021

If to Telergy, to:

Telergy Network Services, Inc.
One Telergy Parkway
East Syracuse, New York 13057
Attention: President
Telephone: (315) 433-5330
Facsimile (315) 433-5350

With a copy to:

Telergy, Inc.
20 Corporate Woods Boulevard
Albany, New York 12211
Attention: General Counsel
Telephone: (518) 462-1882
Facsimile: (518) 463-9937

Notices sent by courier service, personal deliver or overnight mail shall be deemed effective upon receipt; notices sent by facsimile shall be deemed effective upon written confirmation of successful transmission by the sending party, provided a copy of such transmission report shall be produced upon request by the receiving party.

X. MISCELLANEOUS

- 10.1 **Lawful Compliance.** The DOT and Telergy shall at all times observe and comply with the provisions of this Agreement, and its provisions are subject to all laws, ordinances, contracts and regulations which in any manner affect the rights and obligations of the parties herein.

- 10.2 **No Waiver.** The DOT and Telergy agree that any waiver by either party at any time of any right relating to this Agreement shall not be deemed a waiver of the same or similar right at a subsequent time. The failure of either party to seek redress for violation of or to insist upon the strict performance of any covenant or condition of this Agreement shall not prevent a subsequent act, which would have originally constituted a violation, from having the effect of any original violation.
- 10.3 **Force Majeure.** Any failure of either party to perform its obligations under this Agreement shall not be a breach of this Agreement to the extent such failure results from Acts of God (including fires, hurricanes, earthquakes, tornadoes, flooding, snow storms, severe thunderstorms or similar natural occurrences), war, riots and civil insurrection, outbreaks of hostilities, states of emergency, governmental action, delay or inaction that did not result from wrongdoing by the party involved in such governmental action, supply shortages (including power, gasoline and other fuel shortages), omissions of third parties when such omissions did not occur due to action or inaction or the party failing to perform, labor disputes, shortages, strikes or walkouts or transportation delays, or similar occurrences beyond the reasonable control of the other party.
- 10.4 **Binding Effect.** This Agreement shall be binding upon, and shall inure to the benefit of the parties hereto and their permitted successors and assigns.
- 10.5 **Sublet.** To the extent that Telergy sublets or otherwise transfers the Network ("Sublet"), Telergy shall obtain the DOT's prior written consent before such Sublet commences and require all such users of the Network under the Sublet to acknowledge in writing that such user shall comply with all applicable DOT laws, ordinances, and permit, license, consent and approval requirements. For purposes of this Agreement, the parties agree that Telergy's sale, lease or provision of Telecommunications Services, capacity, or dark, lit or dim fiber shall not constitute a Sublet under this paragraph.
- 10.6 **Entire Agreement.** This Agreement sets forth the entire Agreement of the parties with respect to the subject matter hereof and supersedes any prior agreements or understandings, except as otherwise provided herein.
- 10.7 **Modification.** This Agreement may not be amended, changed or otherwise modified

unless by written amendment of this Agreement signed by the parties hereto.

- 10.8 **Severability** Any provision or part of this Agreement held to be void or unenforceable under any federal or New York law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the parties who hereby agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.
- 10.9 **Remedies**. The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive its right to sue on any or all other remedies. Said rights and remedies are given in addition to any other rights such party may have by law, statute, ordinance or otherwise, except as such remedies are expressly limited in this Agreement.
- 10.10 **Construction**. The section, paragraph and other subpart headings in this Agreement are for convenience of reference only and shall neither be deemed to be a part of this Agreement nor modify, define, expand or limit any of the terms or provisions hereof. Words and definitions in the masculine, neuter or feminine gender shall also be read as though in either of the other genders.
- 10.11 **Consents**. No consents or approval required of any party pursuant to this Agreement shall be unreasonably withheld or delayed.
- 10.12 **Acts in Furtherance of Agreement**. The parties each agree to execute and deliver such additional instruments and documents, not creating any obligations or imposing any expenses additional to those otherwise created or imposed by this Agreement, as either party may reasonably request from time to time at or after the execution of this Agreement in furtherance of the express provisions of this Agreement. The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract or this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

- 10.13 **MacBride Principals.** Chapter 807 of the Laws of 1992 subjects all non-federally aided State Contracts to certain requirements regarding the MacBride Principles of Fair Employment in Northern Ireland. Pursuant to its terms, the Chapter requires the inclusion of the following Certification of Nondiscrimination in all contracts:

"Nondiscrimination in Employment in Northern Ireland: MacBride Fair Employment Principles".

In accordance with Chapter 807 of the Laws of 1992 the Consultant, by signing this agreement, certifies that it or any individual or legal entity in which the Consultant holds a 10% or greater ownership interest, or any individual or legal entity that holds a 10% or greater ownership interest in the Consultant, either (1) have no business operations in Northern Ireland, or (2) shall take lawful steps in good faith to conduct any business operations they may have in Northern Ireland in accordance with the MacBride Fair Employment Principles relating to nondiscrimination in employment and freedom or workplace opportunity regarding such operations in Northern Ireland, and shall permit independent monitoring of their compliance with such Principles.

- 10.14 **Assignment** The State and the DOT consent to the assignment by Telergy of its rights and obligations under this Agreement to an entity controlling, controlled by, or under common control with Telergy, should it be necessary to make such an assignment in the future. Prior to making such an assignment, Telergy shall provide the State and the DOT with prior written notice, together with proof of the relationship between Telergy and the assignee, so as to assure that the assignee controls, is controlled by, or is under common control with Telergy. Assignment to any other entity must be upon Notice pursuant to the provisions set forth in Section IX of this Agreement and shall be subject to the State's consent.

10.15 **NYS Year 2000 Warranty**

1. **Definitions**

For purposes of this warranty, the following definitions shall apply:

- A. "Product" shall include, without limitation: any piece or component of equipment,

hardware, firmware, middleware, custom or commercial software, or internal components or subroutines therein which perform any date/time data recognition function, calculation, comparing or sequencing. Where services are being furnished, e.g. consulting, systems integration, code or data conversion or data entry, the term "Product" shall include resulting deliverables.

- B. "Vendor's Product" shall include all Product delivered under this Agreement by Vendor other than Third Party Product.
- C. "Third Party Product" shall include product manufactured or developed by a corporate entity independent from Vendor and provided by Vendor on a non-exclusive licensing or other distribution Agreement with the third party manufacturer. "Third Party Product" does not include product where Vendor is: a) a corporate subsidiary or affiliate of the third party manufacturer/developer; and/or b) the exclusive re-seller or distributor of product manufactured or developed by said corporate entity.

2. Warranty Disclosure

At the time of bid, Product order or Product quote, Vendor is required to disclose the following information in writing to the Authorized User:

- A. For Vendor Product and for Products (including, but not limited to, Vendor and/or Third Party Products and/or Authorized User's Installed Product) which have been specified to perform as a system: Compliance or non-compliance of the Products individually or as a system with the Warranty Statement set forth below; and
- B. For Third Party Product Not Specified as Part of a System: Third Party Manufacturer's statement of compliance or non-compliance of any Third Party Product being delivered with Third Party Manufacturer/Developer's Year 2000 warranty. If such Third Party Product is represented by Third Party Manufacturer/Developer as compliant with Third Party Manufacturer/Developer's Year 2000 Warranty, Vendor shall pass through said Third Party Warranty from the Third Party Manufacturer to the Authorized User but shall not be liable for the

testing or verification of Third Party's compliance statement.

NOTE: An absence or failure to furnish the required written warranty disclosure shall be deemed a statement of compliance of the Product(s) or System(s) in question with the Year 2000 Warranty Statement set forth below.

3. Warranty Statement

Year 2000 warranty 'compliance' shall be defined in accordance with the following warranty statement: Vendor warrants that Product(s) furnished pursuant to this Agreement shall, when used in accordance with the Product documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, including leap year calculations. Where a purchase requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system. In the event of any breach of this warranty, Vendor shall restore the Product to the same level of performance as warranted herein, or repair or replace the Product with processes, time being of the essence at Vendor's sole cost and expense. This warranty does not extent to correction of Authorized User's errors in data entry or data conversion. This warranty shall survive beyond termination or expiration of the Agreement. Nothing in this warranty shall be construed to limit any rights or remedies otherwise available under this agreement.

10.16 Bankruptcy. In the event Telergy, Inc. is involved in a bankruptcy as defined in Section 1.1 of this Agreement, or in the event the interest of Telergy in the property installed in the Freeway ROW properly becomes the subject of a tax lien proceeding, and in the further event that such a petition and/or proceeding shall not be quashed and removed within 45 days after service or levy, whichever first occurs, DOT shall have the right and option within 15 days after the expiration of such 45 day period to require Telergy to remove its Facilities installed in the Freeway ROW at its sole cost and expense and, in the event Telergy fails to do so within thirty days after written notice from DOT under this Bankruptcy Section, DOT shall be entitled to remove the Facilities at Telergy's cost and expense.

10.18 Required Clauses. Appendix "A" contains the standard clauses for all New York State contracts and is attached hereto and is hereby made a part of this agreement as if set forth fully herein.

IN WITNESS WHEREOF, this AGREEMENT has been executed by the STATE, acting by and through the Commissioner of Transportation and TELERGY NETWORK SERVICES, INC., as of the day and year first above written.

0012148
"In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all other copies of this contract."

THE PEOPLE OF THE STATE OF NEW YORK

By: [Signature]
Department of Transportation

Title: [Signature]

Date: December 22, 1998

APPROVED BY THE NEW YORK STATE OFFICE FOR TECHNOLOGY

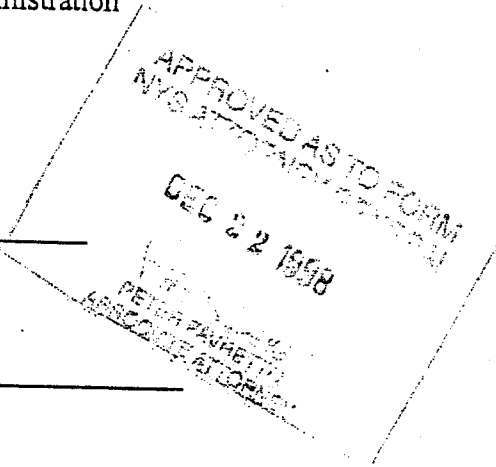
By: Thomas F. Duffy
Thomas F. Duffy
Deputy Director For Administration

Date: December 22, 1998

APPROVED AS TO FORM:


By: _____
Attorney General

Date: _____



Date: _____

APPROVED BY COMPTROLLER

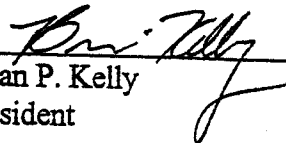

For the New York State Comptroller
Pursuant to Section 112 of the State
Finance Law

Date: _____

4/21/99

TELERGY NETWORK SERVICES, INC.

BY: _____


Brian P. Kelly
President

DATE: December 18, 1998

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

On this 22nd day of December, 1998, before me, the subscriber, personally came to me known and known to me to be the Commissioner of Transportation of the State of New York and the same person described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same as such Commissioner for and on behalf of the People of the State of New York, and affixed the seal thereon, pursuant to and as provided by statute.

Karen Antoniak

Notary Public

STATE OF NEW YORK)

) ss.:

COUNTY OF ALBANY)

KAREN ANTONIAK
Notary Public, State of New York
No. 4798531
Qualified in Albany County
Commission Expires 12/31/99

On this 22nd day of December, 1998, before me, the subscriber, personally came to me known and known to me to be Thomas F. Duffy, the same person described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same as Deputy Director for Administration for and on behalf of the New York State Office For Technology, and affixed the seal thereon, pursuant to and as provided by statute.

Darlene Van Sickle

Notary Public

DARLENE Van SICKLE
Notary Public, State of New York
Qualified in Saratoga County
02VA4983568
Commission Expires July 1, 1999

STATE OF NEW YORK)

) ss.:

COUNTY OF ONONDAGA)

On this 18th day of December in the year 1994, before me personally came Brian P. Kelly, President of Telergy Network Services, Inc., to me known, who, being by me duly sworn did depose and say that the principal office of Telergy Network Services, Inc. is located at One Telergy Parkway, East Syracuse, New York; that he is the President of the corporation described in and which executed the above instrument; and that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Victoria A. Ramundo

Notary Public

Victoria A. Ramundo
Notary - Albany Co.
Reg. No. 4938725
Term Exp. 3/23/97 2000

DOT

Appendix A

Standard Clauses for all NYS Contracts

APPENDIX A

STANDARD CLAUSES FOR ALL NEW YORK STATE CONTRACTS

The parties to the attached contract, license, lease, amendment or other Agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. **EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.
2. **NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the State and any attempts to assign the contract without the State's written consent are null and void. The Contractor may, however, assign its right to receive payment without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.
3. **COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$10,000 (\$20,000 for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office.
4. **WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS. In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance or work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law.

7. NON-COLLUSIVE BIDDING REQUIREMENT. In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contract or warrants, under penalty of perjury, this its bid was arrived at independently and without collusion

aimed at restricting competition. Contractor further warrants that at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR 105.4).

9. SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct and

examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION:

(a) FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER.

All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on his invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.

(b) PRIVACY NOTIFICATION.

(1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and other who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax

administration purposes and for any other purpose authorized by law.

(2) The personal is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in New York State's Central Accounting System by the Director of State Accounts, Office of the State Comptroller, AESOB, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN: In accordance with Section 312 of the Executive Law, if this contract is: (i) a written Agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written Agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written Agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other Agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b" and "c", above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State; or (iii) banking services, insurance policies or the sale of securities. The State shall consider compliance by a Contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Governor's Office of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS. In the event of a conflict between the terms of this Agreement (including any and all attachments thereto and amendments thereof) and the terms of this Appendix the terms of this Appendix shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article XI-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized) but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil

Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United State Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.